IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY,
Appellant;

v.

E. I. MESSINGER,
Appellee,

AND

THE EASTERN OREGON LAND COMPANY,
Appellant,

v.

JOHN D. WILCOX,
Appellee.

Appeal from the Circuit Court of the United States for the District of Oregon.

Appellants' Brief.

DOLPH, NIXON & DOLPH,
and JAMES K. KELLY,
Solicitors for Appellants.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
1897.

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These suits were brought to obtain decrees cancelling United States patents issued to the defendants, purporting to convey to them certain lands described in the complaint. The lands in controversy are within the limits of the grant of lands in place made to the State of Oregon by the Act of Congress approved February 25, 1867, to aid in the construction of a military wagon road. They are claimed by the defendant to be within the overlapping limits of the grant to the Northern Pacific Railroad Company.

The cases were heard in the court below on bill and answer. The bills and answers are alike in both cases, except as to the names of the defendants, the description of the lands claimed by them, and the law of the United States under which they claim to have acquired title to the same. In the case of the Company against Messinger, the land in controversy is situated within twenty miles of the line of the Northern Pacific Railroad Company's road, as designated on the map of the general route of said road, filed by said company August 13, 1870; and in the case of the Company against Wilcox, the land is situated more than twenty miles and less than forty miles from said line.

Precisely the same questions are involved in both suits, except that if the court should be of the opinion that any lands were excepted from the said grant to the State of Oregon by reason of being within the grant of the Northern Pacific Railroad Company, the court will be called upon to decide, in the case of the Company against Wilcox, the question whether the Northern Pacific Railroad Company took by its grant twenty sections to the mile or ten sections to the mile only, in the State of Oregon, between Wallula and Portland.

STATEMENT OF FACTS.

The facts alleged in each bill and admitted by the answer in each suit may be summarized as follows:

THE BILL.

That the complainant is a corporation under the laws of the State of California, and a citizen of that state, and that the defendant is a citizen of the State of Oregon.

That on the 25th day of February, 1867, the Congress of the United States passed, and the President of the United States duly approved, an Act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia river, to a point on Snake river opposite Fort Boise, in Idaho Territory, the alternate sections of public land, designated by odd sections, to the extent of three miles in width on each side of said road, to be exclusively applied to the construction of said road, excepting and reserving from said grant and the operation of said act only lands theretofore reserved or appropriated.

That said act provided that the lands thereby granted should be disposed of by the Legislative Assembly of the State of Oregon for the purpose aforesaid and no other, that said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges for the transportation of any troops, property or mails of the United States, and that the lands thereby granted should be disposed of only in the following manner, that is to say, when the Governor of the state should certify to the Secretary of the Interior that ten coterminous miles of said road were completed, then a quantity of the land granted by the act, not exceeding thirty sections, might be sold, and so on from time to time until said road should be completed.

That by the Act of the Legislative Assembly of the State of Oregon approved October 20, 1868, entitled "An Act dedicating certain lands to the Dalles Military Road Co.," the State of Oregon granted to the said Dalles Military Road Co., a corporation, duly incorporated for the purpose

of constructing said road, all lands, rights of way, rights, privileges and immunities granted or pledged to the State of Oregon by the said Act of Congress, for the purpose of aiding said Dalles Military Road Co. in constructing the road, as mentioned and described in said Act of Congress, and upon the conditions and immunities therein prescribed.

That prior to the 23d day of June, 1869, the said Dalles Military Road Co. surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said Act of Congress and in the said Act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road, and had filed in the executive office of the Governor of the State of Oregon a plat or map of the said Dalles Military Road Co., upon which was traced and shown the definite location of said road, as constructed from its terminus at the Dalles City, Oregon, to its terminus on Snake river, and the limits of the grant of lands in place made to the State of Oregon by the said Act of Congress, to aid in the construction of said road, and also the indemnity limits of the said grant.

That on June 23, 1869, the Governor of Oregon certified that the plat or map of said Dalles Military Road had been duly filed in the executive office, and that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the Act of Congress aforesaid, approved February 25, 1867, and with the said Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868; and the said Governor of Oregon at that date further certified that he

had made a careful examination of said road since its completion, and that the same was built in all respects as required by the conditions of said act, and was then accepted, said certificate being set forth at length in the bill of complaint.

That upon the filing of the said plat or map in the executive office of the Governor of the State of Oregon, showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the Governor of Oregon, certifying to the completion of said road, the grant made by the said Act of Congress of February 25, 1867, to the State of Oregon, to aid in the construction of said road, became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road, as located and constructed.

That the said Dalles Military Road Co. duly filed in the office of the Secretary of the Interior of the United States a map or plat of said Dalles Military Road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the said Governor of the State of Oregon, certifying to the construction of said road, that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States, and was accepted and received and filed in said department, and that on December 18, 1869, the then Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd numbered sections three miles upon each side of said wagon road, as delineated and shown on said map, in favor of the Dalles Military Road Co.

That the Congress of the United States, by an Act approved June 19, 1874, entitled "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon, to aid in the construction of wagon roads, and the certificate of the Governor of Oregon should show that any said road had been constructed or completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands unless the state should by public act have transferred its interest in said lands to any corporation, in which case the said lands were to be patented to such corporation.

That Edward Martin, a citizen of the State of California, placing confidence in the said certificate of the Governor of the State of Oregon, and in said Acts of Congress, and the withdrawal of said lands by the Commissioner of the General Land Office, on the 31st day of May, 1876, purchased in good faith, for the sum of $125,000, then paid by him to the Dalles Military Road Co., all the lands embraced in said grant, except the portions which had been previously sold, and at the time of said purchase and at the time of paying said consideration had no notice or knowledge, actual or constructive, of any claim of the Northern Pacific Railroad Co., or any claim made by any corporation or person or by the Government of the United States, that any portion of the lands granted to the State of Oregon, as aforesaid, were excepted or claimed to be excepted from said grant on account of any previous grant to the Northern Pacific Railroad Co., or otherwise.

That on the 31st day of January, 1877, said Edward

Martin conveyed an undivided one-fourth interest in said lands to D. V. B. Henarie, he the said Henarie having paid one-fourth of the consideration of said conveyance from the Dalles Military Road Co. to Edward Martin, and having made the purchase and paid the consideration in good faith and relying upon the said Acts of Congress and certificate of the Governor of the State of Oregon and the withdrawal of said lands, and that he had no notice or knowledge, actual or constructive, that any portion of the said grant was claimed to be excepted for the reasons aforesaid.

That on the 12th day of May, 1880, said Edward Martin died intestate in the City of San Francisco, leaving certain heirs, who are named in the bill.

That among said heirs were James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors.

That afterwards the interests of the minors in said grant were sold by order of the Probate Court of Wasco County, Oregon, and were purchased at guardian's sale by Peter Donahue and James Phelan, who paid a valuable consideration therefor, and who purchased the same and paid said consideration with no knowledge or notice, actual or constructive, that any portion of the lands within the limits of said grant was claimed by the Northern Pacific Railroad Co., or any other corporation or person, or by the Government of the United States, adversely to the said Dalles Military Road Co.

That afterwards the heirs of said Edward Martin and the said Peter Donahue and James Phelan conveyed the said grant to the Eastern Oregon Land Co., the complainant in the present suits.

That the said Dalles Military Road Co. duly selected, among other lands which had been earned by it by the construction of its said wagon road, the lands in controversy, and that the same were a part of the grant of lands in place to the State of Oregon by the said Act of February 25, 1867, and were a portion of the lands withdrawn in favor of the said Dalles Military Road Co. on the 18th day of December, 1869, and were situated on the south side of the line of the general route of the Northern Pacific Railroad Co., as designated on the said map filed August 13, 1870, and were then unoccupied lands, there being no claim to the same adverse to the company, and that the list containing said selection was duly certified by the Register and Receiver of the Land Office at the Dalles City to the Commissioner of the General Land Office.

That by an Act approved July 2, 1864, Congress granted to the Northern Pacific Railroad Co., to aid in the construction of a railroad from Lake Superior to Puget sound, with a branch, via the Columbia river, to Portland, by the most eligible route, every alternate odd section of public land, not mineral, to the amount of twenty alternate sections to the mile on each side of said road through the Territories of the United States, and ten alternate sections a mile on each side of said road whenever it passed through a state, and whenever on the line thereof the United States had full title not reserved, sold, *granted*, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be *definitely fixed* and the plat thereof filed in the office of the Commissioner of the General Land Office.

That by a Joint Resolution of Congress of May 31, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Co. to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main line across the Cascade mountains to Puget sound.

That on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Co. filed a map or plat of the *general route* of its road, and filed the same in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing among other things the general route of said road, following the Columbia river from Wallula, in the then Territory of Washington, to a point on the north side of said river opposite Portland, in the State of Oregon.

That the Secretary of the Interior accepted said map and directed the Commissioner of the General Land Office to withdraw, on account of the grant to the said Northern Pacific Railroad Co., from sale, pre-emption, homestead or other disposal, the odd numbered sections not sold or reserved, or to which prior rights had not attached, within twenty miles on each side of the route of the said Northern Pacific Railroad.

That the line of the road of said Northern Pacific Railroad Co., between Wallula and Portland, to a point opposite Portland, was never surveyed; that the line of said road between said points was never *definitely located* or fixed by the said company; that no map of definite location

of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department; that the said Northern Pacific Railroad Co. never constructed any portion of its said road between the said Town of Wallula and the said City of Portland.

That upon the filing the said map of the general route of its road by the said Northern Pacific Railroad Co., on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd numbered sections lying within the supposed limits of the grant of lands in place to the Northern Pacific Railroad Co., as aforesaid.

That Congress, by an act forfeiting lands theretofore granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29, 1890, resumed title to and restored to the public domain, so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroads not then completed and in operation, for the construction or benefit of which said lands were granted.

That after the passage of said Act, the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line of the general route of the said Northern Pacific Railroad, between Wallula and a point on the north side of the Columbia river opposite the City of Portland, in the State of Oregon, as said line was designated on said map of general route of the road of said company, filed August 13, 1870, had been granted to the Northern Pacific Railroad Co., and

were reserved and excepted from the said grant made to the State of Oregon by the said Act of February 25, 1867, and had reverted to and became public lands of the United States, open to settlement and sale under the land laws of the United States, and that the said Secretary caused the said lands to be open to settlement and sale, and thereupon the defendant settled upon the said tract of land, and afterwards made application to purchase the same, and that afterwards the President of the United States issued a patent to him for said lands, a copy of which patent is attached to the bill.

That the Secretary of the United States had no jurisdiction or authority to open the said lands to settlement and permit the defendant to settle thereon, and the President of the United States had no jurisdiction or authority to issue a patent therefor.

That at and before the time the defendant settled upon said tract of land, or made claim thereto, or made application to purchase the same, the defendant well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Co., and that the same were claimed by the said Dalles Military Road Co. and its successors and assigns, under said grant.

That if it had been true that the lands in question were excepted from said grant to the State of Oregon, as claimed by the defendant, under the provisions of Section 5 of the Act of Congress entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, the complainant would have been entitled to pur-

chase said lands from the United States, being a bona fide purchaser thereof, without notice of any claim of the said Northern Pacific Railroad Co. to the said lands, but that complainant received no notice and had no notice or knowledge of the application of the defendant to purchase said lands, and had no opportunity to apply to purchase the same under the provisions of said Section 5, or otherwise.

That a patent having been issued for said land, the Interior Department has no longer jurisdiction of the same and cannot give complainant the most convenient and conclusive evidence of its title to the said lands, and cannot issue to complainant patent for the same, as required by the said Act of June 18, 1874, until the patent to the defendant has been cancelled, annulled and set aside, and that said patent is a cloud upon the title of complainant to said land described therein, and complainant is remediless in a court of law.'

THE ANSWER.

By the answer, as we have said, all the material allegations of the bill are as we conceive admitted.

The defendant, answering the allegations of the bill that Edward Martin, the purchaser of the grant from the Dalles Military Road Co., and his grantees and the complainant were bona fide purchasers and had no actual or constructive notice or knowledge that any portion of the lands embraced within the grant to the State of Oregon, to aid in the construction of said wagon road, were excepted therefrom on account of any previous grant to the Northern Pacific, denies that the parties had no *constructive notice*, but alleges *in relation thereto* that at the

time they made said purchase and received their deeds "they were all chargeable with constructive notice of the several Acts of Congress in relation to said lands and the effect thereof, and that under said Acts of Congress and the acts and doings of the said railroad company, no title could pass to the said Dalles Military Road Co. for the lands in question."

Denies that the grant of lands made to the Northern Pacific Railroad Co., between Wallula and Portland, to aid in the construction of a road between said points, never was located or fixed, and that the said railroad company never acquired any right or title or interest to the same.

Denies that the Commissioner of the General Land Office and the Secretary of the Interior wrongfully claim that said lands were excepted from said grant to the State of Oregon on account of being included in the grant to the Northern Pacific Railroad Co.

By the answer also the defendant alleges that on March 16, 1865, the then Secretary of the Interior received from Josiah Perham, the then President of the Northern Pacific Railroad Co., a certain letter of that date, a copy of which is attached to the answer, and that accompanying said letter was a map referred to therein, a copy of which is made part of the answer, and that on the 9th of March, 1865, the Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with a letter, a copy of which is attached to the answer, and that on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior, with a letter, a copy of which is attached to the answer.

These letters show that the map was not received by the Secretary of the Interior or filed, that it was not in accordance with the requirements of the laws of the United States and the regulations of the department, and was rejected.

This map is known as the Perham map, and has been frequently the subject of consideration by the Federal Courts, as we will hereafter show.

ASSIGNMENT OF ERRORS.

And now, on the 5th day of January, 1897, comes the complainant, by Dolph, Nixon & Dolph, its solicitors, and says that the decree in the above entitled cause is erroneous and against the just rights of the complainant, for the following reasons:

First—Because it appears by the bill and answer in said suit that a decree should have been rendered and given therein by said court in favor of the complainant, as prayed for in the bill of complaint, to wit:

That the patent for the lands in controversy issued by the United States to the defendant, described in the bill of complaint, was fraudulent and void as against the complainant, and that the same be cancelled and annulled; that complainant was the owner in fee simple of the lands described in said patent, and was entitled to the immediate possession thereof, and to have the process of the court to be put in possession thereof, and that the defendant was trustee for the complainant of whatever title was conveyed to him under said patent, and that he convey the same to the complainant.

Second—Because it appeared by the bill and answer that the defendant was not entitled to a decree, and the

court erred in rendering a decree for the defendant, dismissing the complainant's bill.

Third—Because it appeared by the bill and answer in said suit that the land in controversy was granted to the State of Oregon by an Act of Congress, entitled "An Act granting lands to the State of Oregon, to aid in the construction of a Military Wagon Road from Dalles City, on the Columbia river, to Fort Boise, on the Snake river," approved February 25, 1867, and had been granted by the State of Oregon to the Dalles Military Road Co. by Act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that all the conditions of said grant had been complied with by said company, the definite location and construction and completion of its road, and the fact of said location and completion of said road had been duly certified to by the Governor of Oregon, on the 23d day of June, 1869, and the map of said completed road had been duly filed in the office of the Secretary of the Interior before December 13, 1869, and on said date the said land had been withdrawn from settlement and sale, and the title of the said wagon road company had become absolute before the passage of the Joint Resolution of May 31, 1870, authorizing the Northern Pacific Railroad Co. to locate the main line of its road via the valley of the Columbia river, and that complainant had succeeded to the title of said company.

Fourth—Because the court erred in holding and deciding that the grant of lands made to the State of Oregon by the said Act of Congress of February 25, 1867, did not come within the exceptions to the grant of land made to the Northern Pacific Railroad Co. by the Act of

Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the Northern route," approved July 2, 1864, and the Joint Resolution of Congress entitled "A Resolution authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," approved May 31, 1870.

Fifth—Because the court erred in holding and deciding that the land in controversy was granted to the Northern Pacific Railroad Co. by said Act of July 2, 1864, or the said Joint Resolution of May 31, 1870.

Sixth—Because the court erred in holding and deciding that it appeared from the bill and answer that the land in controversy was or ever had been a portion of the said grant to the Northern Pacific Railroad Co.

Seventh—Because the court erred in holding and deciding that the grant of lands to the said Northern Pacific Railroad Co. between Wallula, Washington, and Portland, Oregon, was ever located or fixed so as to attach to any particular parcel of land or to show that the lands in controversy were a part of said grant.

Eighth—Because the court erred in holding and deciding that the lands in controversy were excepted from the grant to the State of Oregon, made to it by the said Act of Congress, approved February 25, 1867.

Ninth—Because the court erred in holding and deciding that the supposed grant to the Northern Pacific Railroad Co., for its road from Wallula to Portland, was ever located or fixed, or that said company ever acquired any right or title to the lands in controversy so as to segregate them

from the public domain or to prevent the said grant to the State of Oregon from attaching thereto.

Tenth—Because the court erred in holding that the map referred to in the answer, and known as the Perham map, was valid or in any manner located the line of the road of the Northern Pacific Railroad Co., or located or defined its supposed land grant, or reserved or withdrew any lands from the operation of the said grant to the State of Oregon.

Eleventh—Because the court erred in holding that on account of said grant to the Northern Pacific Railroad Co., made by said Act of July 2, 1864, or the said Joint Resolution of Congress of May 31, 1870, or the transmission by said company of the said Perham map to the Secretary of the Interior, or the filing of said map of August 13, 1870, of its general route of its road by said Northern Pacific Railroad Co., from Wallula to Portland, or any other matter or proceeding, the land in controversy was excepted from the operation of said grant to the State of Oregon.

Twelfth—Because the court erred in holding and deciding that the land in controversy was forfeited to the United States by the Act of Congress forfeiting grants, and had been restored to the public domain, and was open to settlement or subject to sale by the United States at the time of the defendant's alleged purchase of the same.

Thirteenth—Because the court erred in not holding that said defendant had obtained and held the legal title to the land in controversy, as trustee for the complainant.

Wherefore the said complainant prays that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayer of the bill.

QUESTIONS INVOLVED.

The decision of these cases depends upon facts concerning which there is no dispute, and conclusions of law to be drawn from the admitted facts.

The assignments of error, which are the same in both cases, may be summarized and the questions presented for decision briefly stated as follows:

First—The map of the general route of the line of the Northern Pacific Railroad, from Wallula to Portland, not having been filed until August 13, 1870, and the road of said company never having been definitely located between said points, and the grant to that company having been forfeited, can it now be maintained that any portion of that company's grant overlapped the grant to the State of Oregon, or can the grant to the Northern Pacific Railroad Co. be set up to defeat the grant to the State?

Second—Were not the lands embraced within the limits of the grant to the State of Oregon by the Act of February 25, 1867, which might have been found to be within the limits of the grant of lands in place to the Northern Pacific Railroad Co. by the Act of July 2, 1864, had the road of said company been definitely located, between Wallula and Portland, within the exceptions to the grant to the Northern Pacific Railroad Co. of lands "reserved, sold, *granted* or otherwise appropriated at the time the line of said road *should be definitely fixed?*"

Third—If lands were excepted from the grant to the State of Oregon on account of the Northern Pacific Railroad grant, was such exception of lands in the State of Oregon ten or twenty sections to the mile?

Fourth—Were the lands in question withdrawn by operation of law, upon the transmission to the Secretary of the Interior of the Perham map, in 1865, so as to except them from the operation of the grant to the State of Oregon?

Fifth—Were Edward Martin and other purchasers of the grant to the State chargeable with such constructive notice of the Act granting lands to the Northern Pacific Railroad Co., and the subsequent rulings of the Secretary of the Interior, as to prevent them from claiming the lands as bona fide purchasers?

The fourth question is included in the second, and the fifth can only be material in considering the right of the complainant to have purchased the lands in controversy under Section 5 of the Act of March 3, 1887, known as the Land Grant Adjustment Act, if its title to the lands under the grant to the State was held to have failed.

It is unnecessary to discuss the proposition that if the grant to the State of Oregon had attached to the lands in controversy before the claim of the defendant thereto was initiated, the defendant having had notice of complainant's claim to title to the lands prior to his settlement and application to purchase, he should be held to be a trustee of whatever right or title he took under his patent for the complainant. The proposition is established beyond question by decisions of the Supreme Court of the United States, that when the title to land has passed from the Government and the question becomes one of private right, the Courts of Equity may enquire whether the party holding the patent should not be treated as a trustee for another, and may decree the party holding the

legal title to convey it to one found to be equitably entitled to the land.

Gildersleeve v. New Mex. Mining Co.

Johnson v. Towsley, 80 U. S. 72, 13 Wall. 72.

BRIEF AND ARGUMENT.

I.

Were the lands in question excepted from the grant to the State of Oregon on account of the grant to the Northern Pacific Railroad Co., the filing of the map of general route, or other acts of that company?

The defendant contends first that the lands in controversy were excepted from the operation of the grant to the State of Oregon by the transmission to the Secretary of the Interior of the Perham map, and if not, that they were excepted by the filing by the Northern Pacific Railroad Co. of the map of the general location of the route of its road on August 13, 1870.

We will discuss the validity and effect of the Perham map hereafter.

It will be remembered that the grant to the State of Oregon was made on February 25, 1867; that the wagon road in aid of which the grant was made was constructed and completed prior to the 23d day of June, 1869; that the Governor of Oregon had, on July 23, 1869, certified that the road had been definitely located and constructed and completed; that the map of the constructed road and the Governor's certificate of its completion had been filed in the Interior Department prior to December 18, 1869; and the lands embraced within the limits of the grant to the State of Oregon had been withdrawn from settlement and sale on that date.

We contend that the title of the State of Oregon and of its grantees was not affected by the filing of the map of general route on August 13, 1870.

First—Because, being a map of general route only, it had no retroactive force; and

Second—Because it did not identify the Northern Pacific Railroad Co.'s grant so that the grant attached to any particular tract of land.

It has been repeatedly held that the effect of filing a map of general route is only to withdraw the lands from *future* disposition. It does not cause the grant to attach to any particular tract of land. The grant still remains a floating grant until a map of definite location is filed. It may be admitted that if the Northern Pacific Railroad Co. had definitely located its road from Wallula to Portland, its grant as to lands within the limits of its grant in place *not excepted from the grant* would have taken effect and its title would have related back to the date of the grant, and the grant would have attached to specific tracts of land.

But in the present case it is alleged in the complaint and not denied by the answer that "the line of the road of said Northern Pacific Railroad Co. between Wallula and Portland, or to a point opposite Portland, was never surveyed, that the said line of said road between the said points was never definitely located or fixed by the said company, that no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department, that said Northern Pacific Railroad Co. never constructed any portion of its said road between said Town of Wallula and said City of Portland."

So that there is no question in these cases about the character of the map filed on the 13th day of August, 1870; and we claim that the right of the wagon road company to the lands in question was not impaired nor the status of the lands affected by that map; that the question therefore to be considered in these cases is not what lands the Northern Pacific Railroad Co. would have acquired, if it had definitely located and constructed its road between Wallula and Portland, but what rights it acquired, if any, by filing a map of general route, and whether the filing of said map segregated any lands from the public domain or prevented them from passing to the Dalles Military Road Co., under the grant to the State of Oregon.

We think this question has been substantially decided by the Supreme Court of the United States in several cases. In Kan. Pac. Ry. Co. v. Dunmeier, 113 U. S. 636, Mr. Justice Miller, in delivering the opinion of the Supreme Court, said:

"The record shows that while the company did not file its line of definite location until about two months after Miller had made his homestead entry, it did designate the general route of said road and file a map thereof in the General Land Office, on July 11 of the same year, 1866, which was fifteen days before the homestead entry."

Again he said, speaking of the rights acquired by the railroad company by filing a map of general route of its road:

"What were those rights? This action does not, like the filing of the line of definite location, vest in the company a right to *any specific piece of land.* It establishes no claim to any particular section with an odd number."

And in United States v. Southern Pacific Ry. Co., 13 Sup. Ct. Rep. 157, 146 U. S. 600-1, Mr. Justice Brewer, in announcing the opinion of the Supreme Court, said:

"A distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of Butts v. R. R. Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100. The act under consideration in that case was that of July 2, 1864, 13 Stat. 365, making a grant to the Northern Pacific Railroad Co."

And again he said:

"The Act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the distinct location of its road, and limits the grant to such alternate sections as have not been reserved, sold, granted or otherwise appropriated, and are free from pre-emption grant or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of adjoining odd sections within forty miles on each side until the definite location is made."

And he further says:

"The map which was filed on April 3, 1871, was simply one of *general route*, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached."

In the case of Kan. Pac. R. R. Co. v. Atlantic R. R. Co., 112 U. S. 422, the court said:

"The line of the road . . . was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant . . . was in no respect

an impairment of its rights. . . . The order of the withdrawal of lands along 'the probable line' of the defendant's road, made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which it would have acquired to the lands, nor in any respect controlled the subsequent grant."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court in the case of St. Paul, etc., Co. v. Greenhalgh, 26 Fed. 565, said:

"The complainant took nothing by the withdrawal. A withdrawal passes no title. It only prevents other titles from accruing."

In the case of the Wis. Cent. R. R. Co. v. Price, 133 U. S. 496-519, the court, in discussing the effect of the filing of a map of general route, at page 509, said:

"The title conferred by the grant was necessarily an imperfect one. Because until the lands were identified *by the definite location* of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, *afloat.*"

And Mr. Justice Brewer, in the case of Sioux City, etc., R. R. Co. v. Griffey, 143 U. S. 32-41, on pages 38-9, said:

"The first and principal question is at what time the title of the company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. . . . . The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the

line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the Government knowledge of its selected line is it concluded by its action. Then, so far as the purposes of the grant are concerned, is its line *definitely fixed;* and it cannot, therefore, without the consent of the Government, change that line so as to affect titles accruing thereunder."

In the case of the United States v. the Southern Pacific Railway Co., 13 Sup. Ct. Rep. 152, 146 U. S. 570, which was a suit concerning lands between the overlapping limits of the grant to the Atlantic & Pacific R. R. Co. and a grant to the Southern Pacific Ry. Co., in which the grant to the Atlantic & Pacific was the prior grant, but the definite location of its road was subsequent to the definite location of the road of the Southern Pacific, and in which grant to the Southern Pacific there had been inserted the following proviso: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Co. or any other railroad company," it was held that, the grant to the Atlantic & Pacific being a prior grant, and the line of its road having been definitely located, its title related back to the date of the grant, and it took the lands within the conflicting limits of the two grants, in preference to the Southern Pacific Co. Mr. Justice Brewer, in announcing the decision of the Supreme Court, said:

"The question is asked, supposing the Atlantic & Pacific Co. had never located its line west of the Colorado river, would not these lands have passed to the Southern Pacific Co., under its grant. *Very likely that may be so.* The lan-

guage of the Southern Pacific Co.'s grant is broad enough to include all lands along its line; but if the grant to the Atlantic & Pacific Co. had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Co."

As the definite location of the line of the road of the Northern Pacific Railroad Co., from Wallula to Portland, was never made, the grant to the Northern Pacific never took effect as to any land alleged to have been granted in aid of the line from Wallula to Portland, and it cannot be affirmed or established as a matter of law or fact that a single section of land was granted to the Northern Pacific for that portion of its road, or at least any particular section, and therefore it cannot be shown that any portion of the lands embraced within the grant to the State of Oregon were ever granted to or reserved for the Northern Pacific Railroad Co.

But this very question as to whether the grant to the Northern Pacific Railroad Co. between Wallula and Portland ever took effect so as to prevent a subsequent grant from attaching to lands embraced with the limits of its grant, as shown by its map of general route, was decided by this court in the case of the Oregon & California Railroad Co., John A. Hurlburt and Thomas L. Evans, appellants, versus the United States of America, appellee.

In that case, Judge Ross, announcing the opinion of the court, said:

"The only thing remaining in the case that could take the lands in controversy out of the mass of public lands to which the grant of 1866 to the Oregon & California Railroad Co. applied is the preceding grant to the North-

ern Pacific Railroad Co. of July 2, 1864, and the Perham map or diagram filed thereunder.

"It is not pretended that any order of withdrawal was made by any officer of the Land Department, based on that map. Was it sufficient, taken in connection with the Act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Co.?

"It was not, for at least two very substantial and obvious reasons. Upon its face, as well as by the letter accompanying it from the President of the Northern Pacific Railroad Co., of date March 6, 1865, it purported to be the designation of the general route of a railroad from a point on Lake Superior, in the State of Wisconsin, via the valley of the Columbia river, to Puget sound, in the State of Washington, which the letter of its President stated the company had adopted as the line of its road.

"That was not the line the Northern Pacific Railroad Co. was authorized by the Act of July 2, 1864, to locate and build. The line authorized by that Act, and in aid of which that grant was made, extended, as has been seen, from a point on Lake Superior, in the State of Minnesota or Wisconsin, westerly, by the most eligible railroad route, on a line north of the 45th degree of latitude, and within the territory of the United States, to some point on Puget sound, *with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon*, leaving the *main trunk* line, at the most suitable place, not more than three hundred miles from its western terminus (13 U. S. Stat. 365; United States v. Northern Pacific Railroad Co., 152 U. S. 284).

"As said by the Supreme Court, in the case just cited:

"Although that act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget sound, which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget sound, and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route to cover an unlimited extent of country, north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad, 139 U. S. 1, 13, 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant."

"The indefiniteness of the Perham map or diagram, which is so manifest on its face, was alluded to by the Supreme Court in the same case (152 U. S. 292), in these words:

"It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Co. in 1865 constituted the reason why that map was not accepted by the Interior Department."

"So it was as has already been shown. The fact that upon its face it did not purport to be anything more than a mere sketch or diagram unauthenticated by any engineer or officer charged with the duty of designating such a route, coupled with the fact that it was not only not accepted, but was rejected, by the Land Department of the Government as insufficient to properly designate the general route of the road the company was by the act of congress authorized to build, constitutes a second reason why the granting act did not itself operate to withdraw the lands in controversy for the benefit of the Northern Pacific Railroad Co. They, therefore, remained public lands to which the subsequent grant to the Oregon & California Railroad Co. might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee Northern Pacific Railroad Co., operated to withdraw the lands in controversy from the mass of public lands. And if these lands, why not all other public lands within the territory of the United States, situated north of the forty-fifth degree of latitude, and between the termini named in the act? It would be difficult to maintain any distinction in this respect between any of the public lands, not min-

eral, situated in the immense belt through and along which the Northern Pacific Railroad Co. might have located and constructed its road.

"The court below, in its opinion, held that

"It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. *It is unimportant that the company never exercised this power.*"

"In holding that it is unimportant that the Northern Pacific Railroad Co. never exercised its right to locate and build its road along and opposite to the lands in controversy, the court below committed its second error.

"It is said that the grant contained in the act, in and of itself, was "an appropriation of the public lands." Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Co. was authorized to locate and build its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant in and of itself operated as an appropriation of any particular public land, it operated as an appropriation of all public lands within the United States, situated north of the forty-fifth degree of latitude and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route, no distinction can be made between any of the public lands, not mineral, situated in the belt

through and along which the Northern Pacific Railroad Co. might have located and constructed its road. Is it possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of United States v. Southern Pacific Railroad Co. (146 U. S. 570), the Supreme Court said that the intent of Congress in all railroad land grants, as has been declared by that court again and again, was that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands. And in respect to this very grant of July 2, 1864, the Supreme Court, in the case of United States v. Northern Pacific Railroad, 152 U. S. 296, in express terms declared that it embraced *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.* As it is not pretended that any such line, in so far as concerns the lands here in controversy, ever was definitely fixed, how that grant, in and of itself, without any designation of the required route, can be held to embrace these lands, we are unable to understand. It requires the act of the grantee to give precision to such grants and to identify by the location of its road the lands embraced by the grant. When that is properly done, the grant attaches thereto and becomes effective as of its date; but until there is some designation of route by the grantee, there is nothing to segregate any particular land from the mass of public

lands, and, manifestly, if such segregation never occurs, those that otherwise might be covered by the grant remain public lands, and subject to any other valid grant that congress may have made embracing them. The grant of July 2, 1864, to the Northern Pacific Railroad Co. never having taken effect, so far as concerns the lands in controversy in this suit, they were public lands at the time of the grant to the Oregon & California Railroad Co., and at the time of the definite location by that company of the road it was authorized to build along and opposite to them, and falling, as they do, within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed, and cause remanded, with directions to the court below to dismiss the bill."

II.

Was not the grant to the State of Oregon made by the act of February 25, 1867, excepted from the grant to the Northern Pacific?

The only exceptions in the grant to the State were of lands theretofore, that is, prior to February 23, 1876, "reserved to the United States or otherwise appropriated by Act of Congress or other competent authority." The grant to the Northern Pacific Railroad Co. was of lands on the line of its road to which the United States should have "full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

The United States expressly reserved the right *to grant* lands at any time prior to the filing of the map of definite

location of the railroad company's line with the Commissioner of the General Land Office, and expressly excepted the lands it *should grant* prior to that time from the railroad company's grant.

We contend that the said grant to the State of Oregon was made in pursuance of and in accordance with this reservation of the right of the United States to grant lands, though they might be found upon the filing of the map of general location of the route of the Northern Pacific Railroad Co.'s road to be embraced within the limits of the grant to that company, and that lands so granted were expressly reserved from the said company's grant.

In cases of conflicting grants to different railroad companies, the Interior Department, prior to 1878, held that the company which first definitely fixed the line of its road acquired title to the land. In the case of Oregon & California R. R. Co., 14 L. D. 188, the Secretary of the Interior says: "Under the rulings in force in this department prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon & California Co. within the conflict now under consideration."

This ruling of the Land Department, which had always prevailed until 1878, was changed immediately after the decision of the Supreme Court in Missouri, Kansas, etc. v. Kansas Pacific, etc., 97 U. S. 492, which was rendered that year.

In that case, the court was construing the third section of the Act of Congress of July 1, 1862, granting lands to the Union Pacific Railroad Co., in these words: "That there

be and is hereby granted to the said company every alternate section to the amount of five alternate sections not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said map is definitely fixed."

In delivering the opinion of the court, Mr. Justice Field says:

"The grant was in the nature of a float, and the reservation excluded only specific tracts to which certain interests had attached before the grant had become definite or which had been specifically withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. *It was not within the language or purpose to except from its operation any portion of the designated lands to aid in the construction of other roads.*"

Afterwards, in delivering the opinion of the court in St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, Justice Field says:

"But independently of this conclusion, we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Co. was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself." (Missouri, Kansas & Texas Railway v. Kansas Pacific Railway, 97 U. S. 491, 498, 499.)

The quotations from these two decisions seem to hold that priority in the definite location of a railroad gave pri-

ority of right to lands within conflicting limits. This reversed the rulings of the Land Department in that respect, which had prevailed until 1878.

In neither of these cases was it necessary for the court in coming to a decision to make these declarations. Both of them were decided upon other grounds and for other reasons. In fact, they seem to be mere *obiter dicta*.

But conceding that the rule here laid down by the Supreme Court is correct so far as it concerns grants to different railroad companies, it does not follow that a grant to the State of Oregon to aid in the construction of The Dalles Military Road shall not have priority of right over the grant to the Northern Pacific Railroad Co.

The Supreme Court says, in 139 U. S. 17, supra:

"We are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Co. was not intended to cover other grants for the construction of roads *of a similar character*."

But the Northern Pacific Railroad and The Dalles Military road are in no sense roads of a similar character. The former is a road belonging to a private corporation and for its especial benefit. The latter is a public road of the United States, constructed for public uses and especially for the benefit of the United States.

MILITARY ROADS HAVE ALWAYS BEEN CONSTRUCTED AT THE EXPENSE OF THE UNITED STATES, AND ARE IN THE FULLEST SENSE PUBLIC ROADS OF THE UNITED STATES.

An examination of the statutes of the United States will show that for several years preceding the civil war, a number of military roads were constructed at great expense

by the United States within Oregon and Washington Territories.

By Act of Congress of February 17, 1855, (10 Stats. at Large, 608,) $30,000 was appropriated to construct a military road from Astoria to Salem.

On March 2, 1857 (11 Stats. 168), $10,000 additional was appropriated.

On June 2, 1858 (11 Stats. 337), $30,000 additional was appropriated to complete the same.

By act of February 6, 1855, (10 Stats. 603,) $25,000 was appropriated to construct a military road from The Dalles of the Columbia to Columbia Barracks, and $30,000 to construct a military road from Columbia Barracks to Fort Steilacoom, in Washington Territory.

By act of March 3, 1859, (11 Stats. 434,) $100,000 was appropriated to construct a military road from Fort Benton to Walla Walla (known as the Mullan Road).

All these roads, besides others in Oregon and Washington, were constructed under direction of the Secretary of War. They were public and not private roads, and deemed necessary for the protection of the country and to facilitate the movement of troops and munitions of war.

It is matter of history, of which the court will take notice without proof, that in 1862 extensive gold mines were discovered in what is now known as Canyon City, and conflicts were constantly occurring between the miners and Indians in the vicinity. Troops were sent to protect the people who had gone thither. Permanent military camps were established at Camp Watson, Camp Harney and Camp Logan, the former on the trail leading from Dalles City to Canyon City, and the others in the neigh-

borhood of the diggings. There was at the time no road within fifty miles of these military posts, and all supplies had to be transported by pack trains from Dalles City.

Petitions were sent to Congress asking for the construction of a military road from Dalles City to these new diggings, and the result was that Congress passed the act of February 25, 1867, (14 Stats. 409,) granting lands to the State of Oregon to aid in the construction of a military road from Dalles City to Snake river. This is the grant which was subsequently transferred by the State to the Dalles Military Road Co., and a part of which is now in controversy in this suit.

Instead of appropriating the money, Congress appropriated certain sections of land to aid in the construction of this military road, but all the same this was as much of a *public road* as was the Astoria and Salem Military Road before referred to.

Section 2 of the act granting lands to aid in the construction of the Dalles Military road provides that "The said road shall be and remain a *public highway* for the use of the government of the United States, *free from tolls* or other charges upon the transportation of any property, troops or mails of the United States."

The grant to the state was of the odd-numbered sections to the extent of three sections in width on each side of said road. As we have said, the only reservation from the operation of this grant was such land as had heretofore been reserved to the United States or "otherwise appropriated by Act of Congress."

The grant to the Northern Pacific Railroad Co. was a conditional one, and that company had no interest what-

ever in it until the definite location of its road. The land was in no sense *appropriated by Act of Congress.* It was not intended by Congress in making the grant to the Northern Pacific Railroad Co. to withhold any part of these lands from subsequent appropriation, sale or grant, before the line of its road was definitely fixed.

As was said by Mr. Justice Field in Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 498, supra:

"As the sections mentioned could only be known when the route of road was established which might not be for years, the government did not intend to withhold the lands in the meantime from occupation and sale, and thus retard the settlement of the country nor *exclude the lands* for public uses."

The grant of land to the State of Oregon to aid in the construction of the Dalles Military road was for public uses, and is therefore to be liberally construed in favor of the grantee.

III.

If any lands were excepted from the grant to the State on account of the Northern Pacific Railroad Co.'s grant, was such exception of lands in the State of Oregon 10 or 20 sections to the mile?

The grant is of "every alternate section of public land not reserved, designated by odd sections to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and 10 sections of land on each side of said railroad whenever it passes through any state."

We think the intention of Congress to grant to the Northern Pacific Railroad Co. 10 sections of land only on

each side of the road within a State is apparent from the terms of the grant, and that the extent of the grant to that company depends upon the location of the land. By the express terms of the statute, if the road passes through a State the grant is limited to 10 sections to the mile on each side of the road. The words "through the territories of the United States" we think may be read as referring to the grant; but if they refer to the line of the road which the company might adopt, still it may be held, without doing violence to the language employed, that where the line is located in a territory, the grant within a State is limited to 10 sections to the mile.

Congress must have had some reason for making the grant in a territory double that in a State. Lands within a State might fairly, on account of a larger and denser population and older communities and better development of the country, be presumed to be of greater value than lands in a new territory. It was the location of the lands and not the location of the road therefore that must have controlled Congress.

It can hardly be possible that it was the intention of Congress to grant to the company 20 sections of land to the mile within a State if the company should choose to locate its road, as in the present case, within a territory, but immediately along the boundary line between a State and a territory.

A long-established rule of construction of such grants is that they will be construed strictly and not extended by implication beyond their natural import.

United States v. Arrendo, 6 Pet. 699.

Jackson v. Lampshire, 3 Pet. 280-9.

Beatty v. Knowler, 4 Pet. 52.

Charles River Bridge Co. v. Warrer Bridge, 11 Pet. 422.

Griffing v. Giib, 1 McAl. 211.

Grants of land by Act of Congress to aid in the construction of a railroad should be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language.

Dubuque, etc., R. R. Co. v. Litchfield, 23 How. 66-88.

If the construction of the grant to the Northern Pacific Railroad Co. we contend for can be given to the statute it should be adopted by the court.

IV.

Were the lands in question withdrawn by operation of law upon the transmission to the Secretary of the Interior of the Perham map in 1865, so as to except them from the operation of the grant to the State of Oregon made by the act of February 25, 1867?

That the Perham map was not executed in accordance with the requirements of the statute and the regulations of the Department and was not accepted or filed by the Department of the Interior and that no withdrawal of lands on account thereof was made, appears from the correspondence concerning the same, made exhibits to the answer. The Perham map purported to be a map of the main line of the road of the Northern Pacific Railroad Co. from Lake Superior to Puget sound. The act of July 2, 1864, required the main line of said road to be located and constructed upon the most eligible route between those points. As was said by Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United States in

United States v. Northern Pacific R. R. Co., 14 Sup. Ct. Rep. 598, 152 U. S. 284:

"The road should be constructed upon the most practicable line. Any unnecessary deviation from such line would not be deemed within the contemplation of the grantor and would be rejected as not in accordance with the grant."

The decision of the Supreme Court in this case seems conclusive that the Perham map was properly rejected by the Department. In delivering the opinion of the court, Mr. Justice Harlan said:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget sound; and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than 300 miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget sound, the branch line could not have left the main line at some point not more than 300 miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of

latitude. On the contrary, as said in St. Paul & P. R. Co. v. Northern Pac. R. Co., 130 U. S. 1, 13, 11 Sup. Ct. 389, 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.' It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Co. in 1865 constituted the reason why that map was not accepted by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia river and via some point at or near Portland. It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia river, that would strike the main trunk line connecting Puget sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget sound."

In the case at bar it does not appear that the line traced on the Perham map was the most eligible route for the main line of the company's road between Lake Superior and Puget sound.

The question of the validity and effect of the Perham map is thoroughly and ably discussed in the brief of counsel for appellants in the case of the United States of America v. the Oregon & California R. R. Co., John A. Hurlburt and Thomas L. Evans pending in this court, and we take the liberty of incorporating the following portion of their argument applicable to this case in this brief:

"We claim that the lands in suit were in nowise affected by the Perham map, for all of the following reasons:

"(a) It showed two different lines of a road to Puget sound—but did not designate either, even alternately, for a route.

"(b) It did not pretend to designate a route which the company had 'determined' upon or 'fixed.'

"(c) It was not accepted by the United States.

"(d) The Commissioner's rejection is conclusive as to the Northern Pacific Co., because it acquiesced and did not appeal. The United States, having sustained no wrong thereby, could not have complained of its own action at the time, in a direct proceeding—and should not, at this late day, be heard to complain collaterally.

"(e) The Northern Pacific Act did not provide for, nor contemplate, the withdrawal of any land from liability to subsequent *grant*, made before definite location.

"(a) The first section of the act of 1864 authorized the Northern Pacific Co. to construct its *main road* 'by the most eligible railroad route' north of the forty-fifth degree of latitude, from Lake Superior to Puget sound, and also to construct a branch road down the valley of the Columbia river to a point near Portland.

"The Perham map shows several different lines, without

even expressing a preference between them. Two routes, starting at different points on Lake Superior, are brought together in Montana, at the point marked 'A' on the map. One of those lines is marked 'a practicable railroad as surveyed by Governor Stevens,' and the other as 'worthy an examination for a railroad route.'

"From 'K,' in Washington, a line extends northwest to 'H,' on Puget sound—and another line is drawn from 'K' southwesterly along the course of the Columbia river to Vancouver, thence north to the point 'H,' on Puget sound.

"The Northern Pacific Co. did not by this, nor by any map filed prior to the joint resolution of 1870, offer to designate a route for the *branch-line road.* It wanted to build a road which would connect Portland, Puget sound and Lake Superior; but had no authority to extend its branch line beyond Portland, and the act of 1864 terminated the main line at Puget sound. Had the company been assured that, by waiving the branch-line provisions, the main-line road could be built down the Columbia river to Portland, thence to Puget sound, it may be that it would have adopted the Columbia river line; but it is apparent that the company could not make a map committing itself to the adoption of a fixed line for either the branch or main road, as such, without thereby illustrating that it had no authority to build a road from Portland to Puget sound. The act fixed the terminus of the main road at Puget sound, and the terminus of the branch at a point near Portland, and when either road reached the prescribed terminus it must stop there; and the theory out of which the Perham map evidently arose, was that the company might, by waiving its *branch-line* authority, build its *main line* to Puget sound by way of Portland.

"It was for these reasons, we believe, that the Perham map made equivocal and alternative designations of route.

"It is contended . . . that the Perham map made a valid designation from 'K' to Vancouver of the *branch-line* road, notwithstanding it was made and filed as a general route map of the *main-line* road to Puget sound by way of Vancouver; because the same company, at that time, had the right to make and file a general route map, designating for its branch road the identical route from 'K' to Vancouver, shown on this map. The vice of such contention, it seems to us, arises out of contemplating the privileges and rights conferred as a unit of grant—because the beneficiary thereof is the same corporation.

"Suppose the act had authorized the Northern Pacific Co. to construct a road by the most eligible route, from Lake Superior to Puget sound; and another company to construct a branch road from 'K' to Portland. It certainly could not be claimed that such other company would be bound by, or entitled to any benefits from, the Northern Pacific's designation of a line of route from 'K' to Puget sound by way of Portland; nor that the Northern Pacific could designate such a route at all. While the fact that in one instance the Northern Pacific Co. was, and in the other was not, the beneficiary of the two grants, would make a difference in considering the quantity of grant made to that company—it should not make any difference in considering the grants themselves, as such.

"Nothing is claimed here by or for the Northern Pacific Co. The question here is as to whether the filing of the Perham map, showing a line for the *main road* along an unauthorized route, constituted a designation of the

branch-line road, in so far as the branch-line road *might have been*, but was not, mapped for such route.

"(b) The first section of the act of 1864 authorized the construction of a railroad along a line 'to be *determined* by said company.' Section 3 describes the lands granted in relation to such railroad line 'as said company may *adopt;*' and Section 6 provides what shall be done 'after the general route be *fixed.*'

"In the case of Hayes v. Parker et al., 2 L. D., p. 555, considering the provisions of these sections, Secretary Teller said:

" 'The act in question provides for but one line of general route, and one of definite location. It is certainly a very grave question whether legislative withdrawal operates under any preliminary map other than the one which the company *finally determines* shall be the settled and *fixed* general route of the road. If legislative withdrawals operate upon preliminary lines not finally fixed as lines of general route, then we have in this instance a legislative withdrawal of a section of country almost entirely different from that which was finally included in the lines of the general route.'

"It will be remembered that the Perham map was rejected, and no executive withdrawal of any land was made in pursuance of it. But had it been accepted by the Land Department, who might say what lands it operated to withdraw—those along the direct line from 'K' to 'H,' or those along the line whih followed the Columbia river to Vancouver, thence to 'H'? As a matter of fact, the road was not built along either of those lines.

"(c) No executive withdrawal was made in pursuance

of the Perham map; and we claim that the Perham map did not operate a legislative withdrawal—because, among other reasons, it was not *accepted* by officers of the United States.

"We know of no case, the decision of which depended solely upon the Land Officers' acceptance or rejection of a railroad map. It seems to have been treated as a *matter of course*, throughout the decisions relating to the public lands, that there can be no pre-emption, homestead, or other claim under the laws relating to the public lands, without the co-operation of the Land Department; and, in the same way, it has been frequently said, in effect, that acceptance of the Land Officers is essential to the efficacy of railroad maps.

"The grant made by the act of July 23, 1866, to the St. Joseph & Denver City Railroad Co., contained no specific requirement that the company file a map of definite location. The language of the act is:

" 'That there be hereby granted . . . every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of said road is definitely fixed, sold,' etc.

"Construing this grant, Mr. Justice Field said:

" 'Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior,

and *accepted* by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.' (Van Wyck v. Knevals, 160 U. S. 366.)

"Secretary Smith, in the case of Cole v. N. P. R. R. Co., 17 L. D. 9, construing Section 6 of the Northern Pacific Act, held:

" 'Said section provided for a legislative withdrawal of lands within the granted limits, upon the filing of a map of general route, which became operative upon the *approval* of the map.'

"Substantially the same language is used by Assistant Attorney-General Smith, in his opinion to Secretary Delano, reported at page 377, Copp's Pub. Land Laws (1875 Ed.) in which Secretary Delano concurred (p. 380).

"In the case of Buttz v. N. P. R. R. Co., 119 U. S., at page 71, Mr. Justice Field said:

" 'The Act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the definite location of the line of its road; . . . but it also contemplates a preliminary designation of the general route of the road. . . . The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line.'

"(d) Section 2273 of the United States Revised Statutes provides that:

" 'Appeals from the decision of the district officers, in

cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.'

"This section was taken from the act of June 12, 1858, and was very soon after adopted as a rule of practice in respect of all decisions rendered by the Commissioner. Rule 112 of the 'Rules of Practice' provides that:

" 'Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.' (IV. L. D. 49.)

"No appeal was taken for the Northern Pacific Co. from the Commissioner's rejection of the Perham map.

* * * * * * * * * *

"In the case of the *United States v. Marshall Mining Co., 129 U. S.*, at page 587, Mr. Justice Miller, in delivering the opinion, said:

" 'They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.

" 'It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the *right to appeal* to the Commissioner of the General Land Office from the order of the register and receiver dismissing their application. This was not done, and it never has been done.

* * * *

" 'All the errors and irregularities which occur in the process of entering and procuring title to the public lands

of the United States ought to be corrected within the land department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party can not be permitted to remain silent for more than eight years after he has abandoned a contest, submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the land office.'

"It may be safely said that the Northern Pacific Co. could not now maintain a suit, in a court of equity, which depended upon its establishing the validity of the Perham map; and yet, as between the United States and that company, the company, and not the United States, was injured—if any wrong was done by the Commissioner's rejection of the Perham map.

"The Northern Pacific Co. asked approval of the Perham map, and that lands of the United States along the lines shown on it be withdrawn. The United States, by the Commissioner, acting without fraud, rejected the map and refused the the withdrawal. If any wrong was done it was *by* the United States, and *against* the company. The company might have complained, but did not; but the Courts were at all times closed against the United States, for it had *no wrong to redress.*

* * * * * * * * * *

"(e) Nearly all of the railroad land grants provide that there shall be a withdrawal of lands, when a map of gen-

eral route is filed; but the Northern Pacific's Act does not. The words of Section 6, 'and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption,' relied upon as operating a withdrawal, are words of *exclusion* from sale, entry and pre-emption; and are not equivalent to a statutory *withdrawal* from market.

"In the case of *Kan. Pac. Co. v. Dunmeyer, 113 U. S., 629-644*, the decision depended upon whether the land in suit was withdrawn from *homestead entry* by a railroad grant, which provided a withdrawal of lands, upon general route designation, from 'sale' only. It was held (at p. 638);

" 'This act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from "*sale*" by order of the Secretary of the Interior. The lands, therefore, were to be reserved from *sale only*, and not from pre-emption or homestead claims.'

"An analysis of the act of 1864, considered in view of the Joint Resolution of 1870, makes it evident, beyond the plain meaning of the words employed, that Congress did not intend that any lands should be reserved from such subsequent *grant* as it might see fit to make, prior to definite location of the Northern Pacific grant.

* * * * * * * * * *

"All lands 'granted' prior to definite location are excepted—and it is provided that the company shall have other lands in lieu of those 'granted.' Section 6 provides that the lands shall not be subject to 'sale, or entry or pre-emption'; but does not exclude them from subsequent *grant*. * * * *

"Notwithstanding the lands were withdrawn upon general route designation from pre-emption, entry and sale,

persons who settled upon such lands prior to the withdrawal might thereafter pre-empt, enter and purchase the same—but the withdrawal reserved the land from liability to pre-emption, entry or sale, founded upon settlement initiated after withdrawal. And so it was the act provided that the company should have other lands for such as were pre-empted, entered or sold prior to definite location. But the act also provided that the company should take other lands for such as were 'granted' or 'reserved' prior to definite location.

"If, upon general route designation, the lands were withdrawn from the power of Congress to grant them to, or reserve them for, another company, then what did the act mean by saying that the company shall take other lands for those *granted* or *reserved* prior to definite location?"

V.

It is alleged in the complaint that at and before the time the defendant settled upon the said tract of land and made claim thereto and made application to purchase the same, he, the said defendant, well knew that the said lands were within the limits of the grant of lands in place to said Dalles Military Road Co. and of the claim of its successors and assigns to said grant, and that if it had been true that the lands were a part of the grant made to the Northern Pacific Railroad Co. and were not granted to the State of Oregon, the complainant being a bona fide purchaser of said lands would have had a preference right to apply for purchase of lands so patented to the defendant under the provisions of section 5 of the Act of Congress entitled "An Act to provide for the adjustment of land grants made by

Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, but that complainant received no notice and had no notice or knowledge of the application of the said defendant to purchase said land, and no opportunity to apply to purchase the same under the provisions of said section 5, or otherwise.

The Supreme Court of the United States, in the case of the United States v. The Dalles Military Road Co. et al., 148 U. S. 49, held that the purchasers from said company were bona fide purchasers and that their title was beyond challenge. That suit was instituted to annul the grant of lands made to the State of Oregon and set aside patents which had been executed to the grantees of the State.

It has been decided in several cases by the Commissioner of the General Land Office that the complainant, the Eastern Oregon Land Co., being a bona fide purchaser of the wagon-road grant, was entitled to a preference right to purchase lands within the limits of the grant to the State of Oregon and the overlapping limits of the two grants under the provisions of section 5 of the act of March 3, 1887.

It follows that the company was entitled to notice of the application of the defendant to purchase the land in question and to have an opportunity to make application to purchase the land under said act. But the proceedings by which the defendant obtained his patent were *ex parte* and the complainant having no notice of the same had no opportunity to make such an application.

To avoid this conclusion, the defendant attempts to show that the complainant was not a bona fide purchaser

of the land in question, not by denying the allegation that the complainant had no actual or constructive notice that the lands were claimed by the Northern Pacific Railroad Co. or by the United States to be within its grant and excepted from the grant to the State, but by alleging that the complainant is chargeable with constructive notice of the grant to the Northern Pacific Railroad Co. and the construction placed upon said grant to the Northern Pacific Railroad Co. and the proceedings of the Northern Pacific Railroad Co. thereunder and the construction later placed by the Department of the Interior upon the act.

Such constructive notice, if any, as the law imputed to the complainant of the grant to the Northern Pacific Railroad Co. did not prevent the complainant from being a bona fide purchaser within the meaning of the act of March 3, 1887. This question was decided by Judge Ross, in the case of the United States v. Southern Pacific Ry. Co., in his opinion, filed July 27, 1896.

In that case Judge Ross, in announcing the decision of the court, said:

"It is suggested on the part of the complainant that the defendant Wright cannot be regarded as a purchaser in good faith, because he took with notice of the grant to the railroad company and subject to all of its terms and provisions. It is undoubtedly true that he did take with notice of that grant, and subject to all of its terms and conditions. He must be held to have known, for example, that the officers of the Land Department charged with the duty of executing the provisions of that grant were not empowered to issue thereunder any evidence of title to any land that at the time of the taking effect of the grant had been other-

wise disposed of by the Government, or the disposition of which had been committed to others than the officers of that Department. In all such cases in which there is a total lack of jurisdiction over the subject matter, any pretended conveyance thereof by the officers of the Land Department, even if in the form of a patent, would be void in the hands of whomsoever it should come. But where, as in the case at bar, jurisdiction over the subject matter was committed to the officers of the Land Department, and they were charged with the duty of determining the question whether the particular land was or was not covered by the grant to the railroad company, such a decision culminating in the issuance of a patent passes title to the property and is subject only to annulment on a direct attack and for sufficient reasons. (United States v. Winona & St. Paul Railroad Co., 15 C. C. A., p. 96, and cases there cited.) Under well-settled principles of equity, a *bona fide* purchaser under such a patent prior to any attempt to annul it would be protected. (United States v. Winona & St. Paul Railroad Co., *supra;* United States v. California etc., Land Co., 148 U. S. 40-45.)

"Moreover, the act itself in relation to the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, under which the present suit was instituted, declares, in effect, in its fourth section, that those citizens of the United States, or persons who have declared their intention to become such citizens, who have purchased from a grantee company in the honest belief that they were thereby acquiring title, are purchasers in good faith within the meaning of the act; for the provision is that as to all such

lands as are here involved 'which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons *so purchasing* in good faith, his heirs or assigns, shall be entitled to the lands so purchased,' etc. In the legislation in question, Congress, being aware of the fact that public lands had been erroneously certified and patented to various railroad and other companies, provided for the bringing of appropriate suits to annul 'such' certificates and patents, at the same time affording protection to such citizens of the United States and persons who have declared their intention to become such, their heirs and assigns, as have purchased from such grantee companies in good faith; that is to say, in the honest belief that by such purchase they were obtaining title."

In the United States v. Des Moines Nav. & Ry. Co. et al., 142 U. S. 510, Congress had granted to the Territory of Iowa to aid in the improvement of the Des Moines river alternate sections of public land lying within a five-mile strip on each side of said river, and the state accepted the grant. There was question as to whether the grant extended to the state boundaries or only to Racoon Fork, the head of the improvement. The state entered into an agreement with the defendant, the Des Moines Nav. & Ry. Co., to make the contemplated improvement, and after the work was commenced, the State, by an act of the legislature, offered to convey to the company certain lands including some above Racoon Fork in settlement of the contract. The offer was accepted by the defendant and carried out. Subsequently the act was construed and judicially declared to extend no further than Racoon Fork. If

the theory of the defendant is correct, the company had constructive notice that the grant extended only to Racoon Fork. Subsequently, Congress, by joint resolution of March 6, 1861, relinquished to the State all lands above Racoon Fork which had been improperly certified as a part of such grant, "and," in the language of the statute, "which is now held by bona fide purchasers under the State of Iowa." It was held that the company defendant, the Des Moines Nav. & Ry. Co., was a bona fide purchaser within the meaning of the resolution, and that the lands in question passed *eo instante* to the state to the extent of the State's grant to the defendant and immediately vested in the defendant. Mr. Justice Brewer, in announcing the opinion of the court, said:

"Was the Navigation Company a bona fide purchaser under the state? Of course it was. The other defendants who held under it also were. It is claimed by the appellants that the bona fide purchasers referred to were certain parties who had bought portions of these lands from the State of Iowa, paying cash therefor, for the purpose of making improvements, and who had taken possession thereof and were then occupying the same. But the term bona fide purchasers has a well-settled meaning in law. It does not require settlement or occupation. Any one is a bona fide purchaser who buys in good faith and pays value."

In United States v. Winona & St. P. R. R. Co., 67 Fed. 948, it was held that "in a suit in equity brought by the United States under the act of March 3, 1887 (24 Stat. 556), to cancel such certificates (certificates certifying lands to the State of Minnesota under a railroad grant) and to

restore the title of the land to the United States, the equities of bona fide purchasers who hold the legal title under the certificates are superior to those of the United States and constitute a good defense to the suit"; that "such purchasers who hold the legal title are indispensable parties to a suit in equity to annul that title"; and it was held that the purchasers of lands so certified were bona fide purchasers.

See also United States v. Union Pacific Ry. Co., 69 Fed. 974.

Union Pacific Ry. Co. v. United States, 69 Fed. 975.

United States v. C. & O. Land Co., 148 U. S. 41.

United States v. Wenz, 34 Fed. 154.

United States v. Burlington & M. R. Co., 98 U. S. 334-342.

In this last-mentioned case, Mr. Justice Field, in delivering the opinion of the court, declared that the Government "certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees."

Under these authorities the complainant and its immediate grantors must be held to have been bona fide purchasers of the lands in question and as such to have been entitled to a preference right to purchase the lands under Section 5 of the act of March 3, 1887, and to have been entitled to notice of the application of the defendant to purchase the lands and to have an opportunity to apply to purchase the same under said act.

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